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THE ROANOKE RAPIDS CASE

Supreme Court of the United States

October Term, 1952

Nos. 28 AND 29

UNITED STATES OF AMERICA, ON THE RELATION OF OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,
Petitioner

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.,
Respondents

AND

VIRGINIA REA ASSOCIATION, ET AL.,
Petitioners

v.

FEDERAL POWER COMMISSION, VIRGINIA ELECTRIC AND POWER COMPANY, ET AL.,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR VIRGINIA REA ASSOCIATION, ET AL

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v.

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BRIEF FOR VIRGINIA REA ASSOCIATION, ET AL

In order to avoid duplication, the petitioners herein adopt as their own the brief of the Secretary of the Interior. Believing, however, that certain portions of the Secretary's brief understate the reasons and considerations why the order of the lower court should be reversed, these petitioners desire to supplement said brief.

I.

Petitioners' Interest

The discussion of the interest of petitioners, whether they are parties "aggrieved" within the meaning of Section 313 of the Federal Power Act, and whether they have standing in Court, is concluded on page 99 of the Secretary's brief.

The lower court held that petitioners have "no such right, duty or responsibility with respect to the construction of a power project" as to give them standing in court to question an order of the Federal Power Commission (V, 31).

This conclusion, we submit, is clearly erroneous. These petitioners have an interest which is directly affected by the withdrawal of the Roanoke Rapids site from the comprehensive plan for the development of the Roanoke River Basin.

No one will deny that power can and will be developed at that site cheaper than at any other site in the whole river basin, for it is the best power site in the basin.

The retention of that site in the comprehensive plan of Federal development means lower power production costs and therefore lower rates to consumers. Its withdrawal means higher power production costs and therefore higher rates to consumers. As organized consumers of the power to be produced, petitioners have a direct interest in what the power will cost.

Moreover, under the Flood Control Act of 1944, whereby the development of the Roanoke River Basin was authorized, they, along with public bodies, are entitled to a "preference" in the sale of the power and energy to be generated in the basin development and at each site therein. They and public bodies have the first claim on and a prior right to such power and energy.

How can they *exercise* the right, how can they obtain the benefits which Congress plainly directed should be theirs, if the site is withdrawn from the comprehensive plan of Federal development and no public power is produced there?

No one can deny that petitioners, along with public bodies, have a preferred right to the power to be produced at Buggs Island, the construction of which is now at an advanced stage. Its construction is a reality. Its production of power is a certainty. There is nothing contingent or remote about either.

Petitioners have a direct and immediate interest in the cost of Roanoke Basin power. That cost will be decreased if Roanoke Rapids is developed as a part of the Federal project contemplated by House Document No. 650 (I, 158-9). Accordingly, the exclusion of Roanoke Rapids from the Federal project will vitally affect in an adverse manner the cost of the power at Buggs Island to which these petitioners have a legally enforceable right. The exclusion of Roanoke Rapids directly and immediately affects the price which petitioners will be required to pay for government power.

As a practical proposition, Buggs Island and Roanoke Rapids cannot be disassociated. Buggs Island is a costly, upstream, multiple-purpose dam of great height, with a large storage reservoir, designed for flood control, stream regulation and power development. It floods a large upstream area. Roanoke Rapids is a less expensive downstream installation, and is primarily for power development, auxiliary to the Buggs Island Reservoir.

Roanoke Rapids and Gaston will be generating units to convert into electric energy the waters stored in the flood control reservoir at Buggs Island. Under single ownership, control and management by the Government, with their functions properly correlated and integrated, Buggs Island and Roanoke Rapids present a striking example of the

orderly utilization to the maximum extent of the water resources of a large stream for the benefit of the people, providing not only flood control but low-cost power in large quantities.

To hold, as did the lower court, that these petitioners are not "aggrieved" by Vepco's proposed mutilation of the plan for the comprehensive development of the Roanoke River Basin as a Federal project, under which proposal the benefits to cost ratio is appreciably decreased and the cost of power to petitioners appreciably increased, is simply to ignore the realities of the situation.

Under the lower court's conclusion, all that these petitioners can do is to stand on the sidelines, helpless and mute, and witness the power company take away from them and acquire for itself the first right to the low-cost power to be produced at the Roanoke Rapids site. That, in effect, is what the lower court held.

As petitioners read the lower court's opinion, if the Federal Power Commission issues an order licensing a project, there is no "aggrieved" person or party (with the possible exception of another applicant) who can question that order on a petition for review, however erroneous the Commission's action may be. So, by the simple expedient of denying intervention, or granting only conditional intervention, the Commission is empowered, under the lower Court's ruling, to forestall any court review of its orders granting licenses for stream development.

The right of judicial review of orders of administrative agencies involving matters of great public or private concern is a cherished right in our system of jurisprudence. It should not be lightly denied. It should not be whittled away by a narrow interpretation of the law or by a disregard of the facts.

II.

Downstream Benefits to Roanoke Rapids from Upstream Improvements at Buggs Island

We submit that the amount of benefits to be derived at Roanoke Rapids from the upstream improvement at Buggs Island is a matter of great significance.

That such benefits will accrue, all agree. In his report the Division Engineer stated: "The prime regulated flow provided by the Buggs Island plant will permit sizable additional benefits to be obtained by construction of downstream plants at the Gaston and Roanoke Rapids sites" (I, 178b).

Under government ownership and operation of both Buggs Island and Roanoke Rapids, the people will unquestionably get the benefits so derived. The pooling of the benefits from the two will result in cheaper power than from Buggs Island alone.

But, if Vepco gets Roanoke Rapids, what then? How are the benefits to be assessed and at what figure? Or, will they be assessed at all? The lower court attempted to answer these questions (I, 40), by falling back on Section 10(f) of the Federal Power Act. The errors in its conclusion are pointed out on pages 184-7 of the Secretary's brief, wherein it is shown that the payments contemplated in that section of the Federal Power Act, even if assessed, are in no sense commensurate with the benefits to be derived from Federal operation of both plants.

As pointed out in the Secretary's brief at page 186, in all of its years of existence the Federal Power Commission has made only one assessment under Section 10(f.) and that was between two power companies. In no instance has the Federal government been the beneficiary. Not yet has the Commission worked out a formula for assessing such benefits. Their assessment in this instance is purely problematical.

Did Vepco expect to pay such benefits? The evidence shows that, after Vepco submitted its application for the license, it held four conferences with the staff of the Federal Power Commission.

But strange to say at no place in either the original or the amended application was there any entry of the cost to Vepco of such downstream benefits, or even a note accounting for its absence. This is Mr. Cary's testimony in part on cross-examination (II, 584):

Q Why was not some figure put in for that item?

A I have no idea how the requirement or how the amount of such a payment would be calculated.

Q Did your company endeavor to calculate it?

A No, we did not try to calculate the charge because we didn't know the basis for it. In our discussion with the engineering staff of the Commission we investigated and found that the Commission had never set up any standard procedure for making that determination.

* * *

Q Do you recognize, Mr. Cary, that by reason of this upstream improvement at Buggs Island your company, if it is granted the license for which it applies at Roanoke Rapids, will derive considerable benefits?

A We will derive benefits.

Q Have you any way of approximating them?

A Yes, I think the benefits can be approximated.

* * *

Q. Now, irrespective of what the Federal Power Commission may or may not ultimately do, what was the figure you arrived at?

A My calculations indicated that the maximum possible benefit from the Buggs Island development would be $261,000 annually.

No reference whatever to this important item was made in the evidence in chief of Mr. Cary or any other witness for the applicant. And, notwithstanding the fact that the applicant had given consideration to the item, it significantly omitted it from the charges properly to be considered in determining the feasibility of the project.

We believe that it is fair to conclude that neither the applicant nor the engineering staff of the Commission expected Vepco to pay for such benefits. Non-payment was the order of the day.

It is fair also to assume that the Congress, in passing the Flood Control Act of 1944, was aware of the fact that in no instance had the Federal Power Commission ever awarded the Federal government any sum for downstream benefits. Significantly it made no reference in the act to the Federal Power Commission, except to provide that it must approve the rates at which power is to be sold.

It knew that the river basin developments provided for in the act were to be *Federal* undertakings and the Government, as the owner of all of the project units involved, would automatically enjoy all of the benefits that the upper units might confer on the lower. Except as above noted, the Federal Power Commission was not mentioned in the act because it was not contemplated that it should exercise licensing jurisdiction in the river basins covered by the act. In fact, the Commission tried to get into the picture by the inclusion of a proviso recognizing the Commission's jurisdiction, but it was denied admittance (Secretary's brief, 197). That rejection is proof positive that the Congress did *not* intend that the Commission should exercise licensing jurisdiction in such river basin developments.

III.

Reservation of Roanoke Rapids for Federal Development

As pointed out in the Secretary's brief, the test to determine whether a project has been reserved for Federal development so as to preclude licensing by the Federal Power Commission is whether the government has entered upon it as a work of public improvement, that is, whether it has been adopted by law.

We submit that by the passage of the Flood Control Act of 1944 the Federal government entered upon the Roanoke River Basin as a work of public improvement.

By that legislation the government staked out its claim to the development of the water resources of this basin as a Federal undertaking. While it did not thereby actually fence in all of the basin, it did post the government signs and locate the government markers around the whole of it, putting the world on notice of its claim. Not yet has it relinquished any part of that claim. Not yet has it contracted the limits of its filing.

In the terminology of public land laws, the Flood Control Act of 1944 was the "entry" by the government on the Roanoke River Basin for the development of its water resources. That Act of Congress constituted the "filing" by the government of the document required to found a claim for a pre-emptive right to such development. That "entry" has not expired; nor has it been withdrawn. It is in full force and effect. The map of the "entry", designated as "PLATE 24", is filed with and made a part of House Document 650 (Exhibit 1): See Secretary's brief, page 4.

This plan for the *comprehensive* development of the Roanoke River Basin and the control and utilization of its water resources calls for 11 dams and hydroelectric units,

including Philpott on the Smith River and Buggs Island, Gaston and Roanoke Rapids on the Roanoke River.

If words in the English language mean anything, the plan, as approved, contemplates that the development should be undertaken *by the United States Government itself* out of public funds on a step by step basis, with Buggs Island and Philpott as the initial steps. In House Document 650 (Exhibit 1) this is stated time and again, as next shown, and the references which follow are to that document.

(1) In the report of the *District Engineer* this is assumed throughout and is implicit in his report. He estimated a total cost of $124,000,000 for the 11 project units, including transmission facilities. Of these only two (Buggs Island and Philpott) are multiple-purpose reservoirs for flood control, low water regulation and power production, and the other nine are principally for storage and power production. The 11 will have a generating capacity of 360,000 kilowatts and will generate about 1,700,000,000 kilowatt-hours in the average year at an average cost of 2.91 mills per kilowatt-hour (See pp. 11, 79, 88 and 89).

(2) In his report the *Division Engineer* approved the report of the *District Engineer*. He stated (I, 178b) that the "prime regulated flow provided by the Buggs Island plant will permit sizable additional benefits to be obtained by construction of downstream plants at the Gaston and Roanoke Rapids sites" (p. 90). He concluded, page 90 (I, 178b):

> "4. The division engineer recommends *the adoption of a project* to provide for comprehensive and orderly development of the water resources of Roanoke River, Va. and N. C., substantially as proposed by the district *engineer, at an estimated total cost to the United States of $124,000,000*. He further recommends that the *initial development*, involving construction of multiple-purpose reservoirs at Buggs Island and Philpott at esti-

mated costs of $30,900,000 and $5,240,000, respectively, be authorized at this time for immediate post-war accomplishment." (Emphasis supplied)

(3) The *Board of Engineers* for Rivers and Harbors reviewed the reports of the district and division engineers. In its report of February 7, 1944, in section 9 (at p. 9) it stated (I, 148):

"The comprehensive plan of improvement, consisting of 11 developments for hydroelectric power, flood control, navigation, and other uses, provides the best plan for the development of the water resources of the Roanoke River Basin. *The estimated Federal construction cost, including transmission facilities, is $124,000,000 and the annual cost of operation and maintenance $657,800".* (Emphasis supplied)

(4) The Federal Power Commission, in response to the request of the Chief of Engineers (I, 138-43) submitted its report dated May 3, 1944 (p. 2). It referred (at p. 3) to the report of the Board of Engineers showing that the estimated total cost of the 11 projects was $124,000,000 and that *"the ratio of benefits to cost for the complete development has been estimated at 1.47"* (Emphasis supplied). It recommended that the top of the gates be raised at Buggs Island, Gaston and Roanoke Rapids (p. 4). It reported, page 4 (I, 142):

"The Commission concurs in the conclusion of the Board of Engineers for Rivers and Harbors that the comprehensive development of the Roanoke River Basin, in general accordance with the plans prepared therefor by the district engineer consisting of 11 dams and reservoir projects with power, is desirable, and that the Buggs Island and Philpott projects would constitute *a desirable initial step* in the development of the Roanoke River Basin." (Emphasis supplied)

(5) The *Chief of Engineers* by letter dated May 22, 1944 (pp. 1 and 2) reported to Congress (I, 135-38). He referred to the report of the Federal Power Commission (p. 2), and approved the general plan. He made it as plain as day by whom the work should be undertaken. In paragraph 4 on p. 2 (I, 137) he stated:

> "To safeguard the interest of navigation and flood control, *the dams and power facilities should be constructed, operated, and maintained under the direction of the Secretary of War and the supervision of the Chief of Engineers.*" (Emphasis supplied)

His recommendation to Congress (I, 137-38) was in these words (p. 2):

> "5. I accordingly recommend that the general plan of development outlined in the report of the district engineer be *adopted* as the basis for improvement, step by step, of Roanoke River and tributaries for flood control, navigation, and other purposes, and that the Buggs Island and Philpott projects be authorized for construction as the initial step, generally in accordance with the plans of the district engineer and my comments herein. . . .". (Emphasis supplied)

By the Flood Control Act of 1944, approved December 22, 1944, Congress acted. In Section 10 it said:

> "The general plan for the comprehensive development of the Roanoke River Basin for flood control and other purposes recommended by the Chief of Engineers in House Document numbered 650, Seventy-eighth Congress, Second Session, is approved. . . .".

It put its seal of approval on that report—a report which emphasized that the 11 dams and power facilities should be constructed, operated and maintained by the United States.

Surely the Congress must be credited with saying what it meant and meaning what it said.

Those river basins, comprehensive plans for the development of the water resources of which Congress approved in the Flood Control Act of 1944, *and jurisdiction of which it assumed thereby*, were by virtue of that act *withdrawn* from the licensing jurisdiction of the Federal Power Commission conferred on it by the Federal Power Act. The Congress gave and the Congress has taken away. The Commission has what is left.

Conclusion

We submit that the judgment of the lower court should be reversed and the causes remanded with directions to set aside the Commission's order.

Respectfully,

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VIRGINIA ELECTRIC COOPERATIVE
NORTHERN NECK ELECTRIC COOPERATIVE
SHENANDOAH VALLEY ELECTRIC COOPERATIVE
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CRAIG-BOTETOURT ELECTRIC COOPERATIVE, and
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Brief of Virginia Electric and Power Company in Opposition

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No. ~~659~~ 29

VIRGINIA REA ASSOCIATION, ET AL,
Petitioners

v.

FEDERAL POWER COMMISSION
AND
VIRGINIA ELECTRIC AND POWER COMPANY,
Respondents

BRIEF OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION

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Dated April 23, 1952.

Supreme Court of the United States

October Term, 1951

No. 659

VIRGINIA REA ASSOCIATION, ET AL,
Petitioners

v.

FEDERAL POWER COMMISSION
AND
VIRGINIA ELECTRIC AND POWER COMPANY,
Respondents

BRIEF OF VIRGINIA ELECTRIC AND POWER COMPANY IN OPPOSITION

The Petition in this case adopted the matter set forth in the petition filed by the Secretary of the Interior in Case No. 658. This respondent, Virginia Electric and Power Company, adopts for its brief here its brief in opposition in that case with the exception of the discussion dealing with the authority of the Secretary's counsel (pp. 43-45). The discussion dealing (pp. 40-42) with the Secretary's want of any interest, however, is pertinent here, since the position of these petitioners is derivative from that of the Secretary.

If Congress were to create federal power at Roanoke Rapids for the Secretary of the Interior to market, the petitioners here would have "preference in the sale of such power" under Section 5 of the Flood Control Act of 1944, 58 Stat. 887. The petitioners' interest thus lies only in a hope

of future legislation. We believe the Court should hear litigation only at the suit of parties having an interest under existing law, not at the suit of those who might have an interest if there were some other law.

The Petition here discusses various matters of fact foreclosed by the findings, in the trial of which the petitioners say they had an interest. In whatever way the effort to raise these issues of fact in the Petition to review in the Court below may have affected their interest there, the Petition to this Court disclaims any effort to bring up these issues (pp. 8-9), and any interest in them has no bearing here. Here, on the merits, petitioners seek to litigate only the Federal Power Commission's authority in law to grant the license. For that issue, petitioners' only interest is what interest they might have if there were some further Act of Congress.

Conclusion

For these reasons and for the reasons upon the merits set forth in the brief by this respondent in opposition in Case No. 659, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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